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No. 82-5763

IN THE

SUPREME COURT OF THE UNITED STATES

1982 TERM

EDWIN RIVERA,

Petitioner,

-against-

PHILIP COOMBE, JR., Superintendent,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

# MEMORANDUM FOR RESPONDENT

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## Question Presented

Whether the "charge as a whole" analysis of the Court of Appeals for the Second Circuit, as applied to claimed violations of the principle enunciated in Sandstrom v. Montana, 442 U.S. 510 (1979), so conflicts with decisions of other United States Courts of Appeals as to warrant resolution by this Court.

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# MEMORANDUM FOR RESPONDENT

## Preliminary Statement

This memorandum is submitted on behalf of respondent, who does not oppose petitioner's petition for a writ of certiorari, but instead requests this Court to consider the petition in conjunction with other petitions now pending in this Court and raising similar issues.

For purposes of this memorandum, respondent adopts the "Statement of the Case" set forth at pages 1-9 of the petition for a writ of certiorari.

MEMORANDUM

On October 1, 1982, the Attorney General of the State of New York filed in this Court a petition for a writ of certiorari, Ramirez v. Jones (No. 82-504), arguing that coherence of federal jurisprudence necessitates this Court's now resolving the conflict which has developed among the United States Courts of Appeals in their interpretations and applications of Sandstrom v. Montana, 412 U.S. 510 (1979). Through counsel (the New York Legal Aid Society), respondent Ramirez argued in opposition that "Sandstrom's progeny in the circuit courts of appeal show substantial harmony," and that "the circuits have been largely consistent" in interpreting that decision (Brief for Respondent in Opposition, at 3 and 10).

In the instant case, however, petitioner's counsel (again, the New York Legal Aid Society) now asserts (Petition for a Writ of Certiorari, at 17) the following:

> ...the Second Circuit's sweeping "charge as a whole" analysis conflicts both with the Eighth Circuit's analysis and with that in Sandstrom itself. To resolve the conflict, petitioner's case should be accorded this Court's full plenary review.

In view of the fact that the Attorney General of the State of New York and the New York Legal Aid Society, as counsel for the parties in both Ramirez v. Jones (No. 82-584) and in the instant case, explicitly recognize that there is some conflict between at least two circuits regarding the proper analytical framework in which to scrutinize a claimed Sandstrom error, and further in view of the several petitions now pending before this Court in which the application of Sandstrom is one of the primary

questions presented,* respondent herein respectfully requests that the instant petition be considered in conjunction with the petition for a writ of certiorari previously filed by the Attorney General of the State of new York in Ramirez v. Jones, supra, or that consideration of the instant petition be held in abeyance until this Court's disposition of the Ramirez petition, or that all pending petitions posing questions concerning the application of Sandstrom be consolidated and certiorari granted as to them.

## CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE CONSIDERED IN TANDEM WITH THAT STILL PENDING IN RAMIREZ V. JONES (No. 82-584) AND/OR ANY OTHER PETITIONS RAISING SANDSTROM ISSUES, OR SHOULD BE CONSOLIDATED WITH THOSE PETITIONS WITH A VIEW TOWARD GRANTING CERTIORARI TO RESOLVE EXISTING CONFLICTS AMONG THE CIRCUITS CONCERNING THE PROPER INTERPRETATION AND APPLICATION OF THIS COURT'S DECISION IN SANDSTROM V. MONTANA, 412 U.S. 510 (1979).

Dated: New York, New York
December , 1982

Respectfully submitted,

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Attorney for Respondent

PETER H. SCHIFF
Acting Attorney-in-Chief
Appeals and Opinions

SUSAN L. YARBROUGH
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* See Arroyo v. Jones, 685 F. 2d 35 (2d Cir. 1982), petition for cert. filed, September 21, 1982 (No. 82-521); Langone v. Smith, 682 F. 2d 287 (2d Cir. 1982), petition for cert. filed, September 15, 1982 (No. 82-5395); Mancuso v. Harris, 677 F. 2d 206 (2d Cir. 1982), petition for cert. filed, August 16, 1982 (No. 82-5239).